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## ABSTRACT

The "pig in the parlor" refers to a growing area of censorship. In this paper, "parlor" stands for public schools, and "pig" for speech that need not be protected if it occurs at an inappropriate time or place, i.e., if such speech is not considered to bear the "imprimatur" of the schools. A review of the U.S. Supreme Court decisions affords insight into the meaning of free speech as a democratic value in the context of the public school setting. This review of Court cases focuses on: (1) a brief overview of the law governing free speech; (2) specific legal concepts pertinent to free speech in the context of the public schools; (3) a discussion of two recent Supreme Court decisions on free speech in schools and subsequent lower court decisions; and (4) some general conclusions concerning issues related to the conference's theme of "Ethics and Democratic Values in the Education Profession." The two cases discussed are the "Bethel School District No. 403 v. Fraser" and "Hazelwood School District v. Kuhlmeier." (40 references) (SI)

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U.S. SUPREME COURT DECISIONS IN BETHEL AND  
HAZELWOOD: Is the Pig in the Parlor Gone?

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U.S. Supreme Court Decisions in Bethel and Hazelwood:

Is the Pig in the Parlor Gone?

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This conference theme's primary focus, "Ethics and Democratic Values in the Education Profession," is to consider the moral character education of professional educators. This focus raises numerous philosophic questions. One question is what are the democratic values to be considered for such an education? This paper's focus is on an acknowledged democratic value--free speech. More specifically, the nature of free speech in the public schools.

Free speech has long been recognized as central to the well-being of a democratic society. The operational nature of free speech is determined in large measure by why, how, who, and where it is exercised. One institution responsible for interpreting the legitimate exercise of free speech is the courts. Therefore, a review of court decisions can afford some insights into the meaning of free speech in the context of the public school setting. These insights can assist in indicating what needs to be conveyed to aspiring and practicing educators regarding this democratic value.

The review of court cases will focus on: (1) a brief overview of the law governing free speech; (2) specific legal concepts pertinent to free speech in the context of the public schools; (3) a discussion of two recent U.S. Supreme Court decisions on free speech in schools and subsequent lower court decisions; and (4) some general conclusions related to issues related to the conference's theme. This review is about court interpretations of free speech, and is not to develop a philosophic resolution. It is intended to encourage philosophy of education scholars to critique the courts' rationale in determining the nature of free speech as a value in a democratic society. This task is important at a conference whose theme is concerned with the nature and content of professional educators' preparation.

One final note is necessary regarding assumptions that are associated in the relationship of the courts and the operational meaning of free speech as a democratic value. It is important to know the law by what it has done as well as by what it is. The law is a human institution; it is a tale of human choices. Its interpretation concerns central issues of human life: the preservation of human life, the protection of property, the exercise of individual freedoms, and the allocation of society's resources. All encounters in law are personal, human encounters. The study of court decisions is about individuals involved in the state's efforts to determine blame, to punish wrongdoing, and to encourage socially valuable activity.

General Nature of Free Speech

It is helpful to fully understand the nature of free speech rights under the first amendment within the context of public schools to first explore the law governing speech outside the confines of the schools. The first amendment

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states: "Congress shall make no law . . . abridging the freedom of speech, or press."<sup>1</sup> Despite the absolute nature of the language, some limitations on free speech and press are permissible. Some examples are defamatory speech<sup>2</sup> and incitement to illegal action.<sup>3</sup> Even in those situations where speech is not protected, such as obscene speech, the state must grant the speaker access to the courts to challenge such a classification.<sup>4</sup>

The limitation of speech by the state using prior restraint, however, is regarded with disfavor, even though the U.S. Supreme Court has refused to completely ban its use.<sup>5</sup> Any attempts to invoke prior restraint requires the state to justify its imposition.<sup>6</sup> Also, any prior restraint imposed before judicial resolution is enforceable only for a specific and brief period of time.<sup>7</sup>

Free speech can be limited by the forum in which it takes place. Nothing in the Constitution requires the state to grant access to everyone who wishes to exercise their right to free speech on state property without regard to the property's nature or the disruption to state functions that might be caused by the speaker's activity.<sup>8</sup> The U.S. Supreme Court adopted a forum analysis as a means of determining when the state's interest in limiting the use of its property for its intended purpose outweighs the interests of those wishing to use the property for other purposes.<sup>9</sup> The Court said there were three types of public forum. The first is the quintessential public forum which includes streets, sidewalks, and parks which have been consistently used by the public for purposes of assembly to communicate thoughts between citizens on matters of public interest. In order for the state to limit the content of speech in this forum, it must show a compelling state interest. The second is the limited public forum which includes state property generally for communication by the public. While the state is not required to retain the open character of the forum, as long as it does so by either a stated policy or continued practice, it is bound by the same standard as the quintessential forum. The third is the closed public forum which is not by tradition or policy designated as a forum for free speech. Here, there is no constitutional right to access simply because it is owned or controlled by the state. The closed forum can be reserved for its intended purpose, so long as the policy is reasonably related to the property's purpose.

Another limitation to free speech that is pertinent to this paper's topic regards minors. Two Supreme Court decisions limited the speech content for minors, even though the content was protected when directed to adults. The Court held that soft-core pornographic magazines, while not obscene by contemporary community standards for adults, could not be sold to minors.<sup>10</sup> The Court reasoned the state's interest in protecting the welfare of minors and to support parents' objections to the magazines justified the ban. Also the Court upheld a Federal Communication's Commission decision to ban George Carlin's comic monologue from the airwaves.<sup>11</sup> While the Court did not regard the monologue as obscene, its language was vulgar and lewd and this justified the decision because the broadcast was accessible to minors. The Ginsberg and Pacifica indirectly establish that first amendment free speech rights of minors are not coextensive with those of an adult.

### Free Speech in School Setting

In the school setting problems arise when first amendment rights come into conflict with the strong public policy that schools are to transmit

accepted values and important knowledge to the next generation. The achievement of this policy has been primarily a local concern, and courts have been reluctant to intervene unless there is a possible violation of a right. Such intervention has happened with major impact on how public schools achieve the policy. The intervention of the U.S. Supreme Court is the most significant. In Tinker v. Des Moines School District,<sup>12</sup> the Supreme Court held that school officials violated student free speech rights when a number of students were suspended for wearing black armbands at school to protest the Vietnam War. The Court ruled that the armbands neither disrupted school operations nor invaded the rights of others. The decision's major premise was that students and teachers possess constitutional rights while on the school campus. The Court did caution, however, that those rights must be evaluated in light of the special characteristics of the school environment. Tinker, in essence, defined free speech rights of teachers and students as less than when away from school, but still worthy of respect and protection.

The Tinker decision triggered a great deal of litigation in the federal and state courts. Generally, the courts favored the free-speech rights of students because school officials did not show the speech could or did "materially and substantially interfere with the requirements of discipline in the operation of the school."<sup>13</sup>

A number of decisions involving school-sponsored newspapers disallowed censorship by school officials because it violated students' first amendment rights. In three cases,<sup>14</sup> federal courts found that the newspapers were not part of the curriculum, and thus concluded the papers' content was not subject to content control in the same manner as a regular class. The courts determined the papers were a limited forum for student expression and then applied the Tinker disruption test and found no material interference with the schools' operations. In two cases,<sup>15</sup> however, the courts did uphold editorial censorship of school newspapers based on the second prong of the Tinker standard--invasion of other students' rights.

A well-known Supreme Court decision regarding first amendment rights and curriculum values was Board of Education v. Pico.<sup>16</sup> The Court held that the local school board could not remove books from the school library simply because its members objected to the ideas contained in the books. The board's contention that it had absolute discretion to transmit community values was rejected by the Court. While acknowledging the books could be removed if vulgar or obscene, the Court noted the board's motivation for removing the books--some members regarded them personally offensive--did not justify their removal.

It is important to note that after the Tinker decision in 1969, the Supreme Court did not consider any similar free-speech rights in order to reaffirm or modify its standard of material and substantial disruption or violation of another person's rights. The Court had had opportunities, but declined to do so.<sup>17</sup> Then in 1986, the Court handed down its decision in Bethel School District No. 403 v. Fraser.<sup>18</sup>

#### Bethel Decision

Matthew Fraser delivered a speech monimating a fellow student for a student body office. There were some 600 students--many were fourteen years old--at a school-sponsored assembly. The speech referred to the candidate in graphic

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and specific sexual metaphor.<sup>19</sup> Some students responded to the speech with loud hoots and suggestive sexual gesturing. Other students acted bewildered, and teachers stated they had to take class time to calm students and discuss the appropriateness of the speech's content. Matthew was suspended for three days for violating a school policy regarding the use of profane language and disrupting the school's operations. He sued, claiming violation of his free-speech rights. A federal district held the suspension violated his free-speech rights. The Ninth Circuit affirmed the district court's ruling, holding that Matthew's speech was indistinguishable from the armbands in Tinker.<sup>20</sup> Also the court rejected the school district's argument that because it had responsibility for school curriculum it had power to control the language used during a school-sponsored activity.

The Supreme Court reversed the Ninth Circuit's ruling. It first rejected the assumption that the armbands in Tinker were equivalent to the "use of lewd and obscene speech" in order to nominate a fellow student. The Court then turned to consider what level of protection is afforded student speech given the particular characteristics of the school. It first noted that the purpose of the "American public school system" is that "public education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."<sup>21</sup> How then are student free-speech rights and the school's purpose of inculcating "manners of civility" to be accommodated? The Court said the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially inappropriate behavior."<sup>22</sup>

To support such a balance, the Court noted that Congress has rules "prohibiting the use of expressions offensive to the other participants in the debate."<sup>23</sup> The Court, citing the Ginsberg and Pacifica case, said its own jurisprudence "has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children."<sup>24</sup>

Then, applying the Tinker standard to the facts of disruption, the offensive reaction of some teachers and students, and the speech's use of vulgar and lewd content, the Court held the school officials "acted entirely within [their] permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."<sup>25</sup>

The Bethel decision was based on the Tinker standard, and was not a sharp change in the Court's position regarding student free speech rights. The subsequent importance of Bethel, however, is contained in the assumptions the Court made regarding the purpose of schools and the authority of school officials to ensure its achievement. In regard to the purpose of school, the Court noted that the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and civics class; schools must teach by example the shared values of a civilized social order."<sup>26</sup> Also, the Court stated that the essence of public education "is the inculcation of fundamental values necessary to the maintenance of a democratic political system."<sup>27</sup>

School officials' authority is not limited by the first amendment to determine that a "vulgar and lewd speech such as [Fraser's] would undermine

the school's basic educational mission."<sup>28</sup> In such situations the Court concluded that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."<sup>29</sup>

While persons may disagree over the extent of the disruption and the speech's vulgarity, the Bethel decision strongly indicated the Court was willing to limit student speech rights in school-sponsored activities in conjunction with its view of the public school's purpose; i.e. inculcating fundamental democratic values. This willingness was clearly reflected a year and a half later in the Court's decision in Hazelwood School District v. Kuhlmeier.<sup>30</sup>

#### Hazelwood Decision

The case concerned the principal's censorship of East Hazelwood High School's newspaper, Spectrum. The paper was school-sponsored and was written and edited by students in Journalism II class. The students received academic credit for their work, and the district allocated funds for the printing of the paper. Page proofs for the last edition of the 1983 year were submitted to the principal, per usual practice, for review prior to publication. The principal objected to two articles. One of them described three Hazelwood students' experiences with pregnancy and the other discussed the effects of divorce on students.

The principal was concerned. Although false names were used in the pregnancy article, he believed the pregnant students could be identified since he had determined who they were. He also regarded the article's reference to sexual activity and birth control were inappropriate for the school's younger students. Further, the principal was concerned that a named student in the divorce article had stated her father "was always out of town on business or out late playing cards," and "always argued about everything" with her mother.<sup>31</sup> He believed the student's parents should have been contacted in order to respond or to consent to the publication as required by good journalism practices.

Since there was no time to change the stories, the principal deleted the articles and the Spectrum was printed with two pages eliminated. The staff members of the paper sued, alleging their free speech rights were violated because of the deletions. The federal district court ruled in favor of the school district stating prior restraint could be imposed on speech activities that are an integral part of the school's educational function. This included the publication of a school-sponsored newspaper by a journalism class, so long as their decision had a substantial and reasonable basis.<sup>32</sup> The Eighth Circuit reversed the district court's decision holding the Spectrum was not only part of the curriculum but also a limited forum for student expression.<sup>33</sup>

The Supreme Court granted the school district's appeal to consider "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."<sup>34</sup> The Court's response to the issue had three parts. The Court first found the paper was not a limited public forum because it was part of student work done for credit in class, and the district, either by policy or practice, did not open the school's curriculum for indiscriminate use or for use by student organizations.<sup>35</sup>

The second and most significant part of the decision was the Court distinguishing the Hazelwood case from Tinker. The Court stated:

[t]he question whether the first amendment requires a school to tolerate particular student speech --the question that we addressed in Tinker--is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.<sup>36</sup>

The distinction between the toleration of speech protected in Tinker and the promotion of speech as present in Hazelwood was an important distinction. The Court concluded that "the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."<sup>37</sup>

If the standard is not the Tinker "material and substantial disruption," then what is to be the standard? The Court ruled "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>38</sup> The reasonableness standard was regarded by the Court as consistent "with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."<sup>39</sup> The Court then suggested a list of possible justifications for censoring school-sponsored student expression: (1) "to assure that participants learn whatever lessons the activity is designed to teach"; (2) students "are not exposed to material that may be inappropriate for their level of maturity"; and (3) "the views of the individual speakers are not erroneously attributed to the school."<sup>40</sup>

The third part of the Court's response was to rule that the principal had not violated the students' free speech rights because it was reasonable under the circumstances. The circumstances noted by the Court were the possible identification of the unnamed students in the pregnancy article, the inappropriateness for the younger students, and the failure to practice good journalism by giving the parent criticized in the divorce article a chance to respond.<sup>41</sup>

For the first time, the Court in Hazelwood analyzed students' first amendment rights without utilizing the rationale used in Tinker. Although Hazelwood does not overrule Tinker, it definitely limits it because the Court limited the Tinker standard to non-school-sponsored activities. Therefore, when student speech can be associated with school-sponsored activities that "members of the public might reasonably perceive to bear the imprimatur of the school,"<sup>42</sup> the courts are to apply the Hazelwood standard. That is to

determine if there is a reasonable relationship to legitimate pedagogical concerns that merits limiting student free speech.

#### Progeny of Bethel and Hazelwood

What has been the effect of the Bethel and Hazelwood decisions on subsequent lower court decisions regarding student free speech rights? A brief review of some cases can afford insight into the nature of this important democratic value. The review will first look at those cases that cited Bethel in considering school officials' authority in relation to student free speech. Second, cases that cited Hazelwood regarding the extent of school officials' authority to determine appropriate school-sponsored expression, will be discussed.

In Gano v. School District No. 411,<sup>43</sup> a federal district court denied a student's request for a preliminary injunction to stop school officials from suspending him for wearing a T-shirt. The student, who had been requested by his senior class to design a T-shirt, drew a caricature of the school's principal, vice-principal, and dean of boys sitting against a fence on a campus drinking alcoholic beverages and appearing drunk. The T-shirt was to be sold to students during homecoming week. School officials suspended the student for three days because they regarded the caricature as offensive. The student filed a lawsuit to stop the suspension. The court first noted, under Idaho law, schools are charged with teaching about the effects of alcohol. Citing the Bethel decision, the court stated that if the school promoted the wearing of the T-shirt it would degrade the administrators as role models, "and their position would be surely compromised if [the] T-shirt was circulated among the students."<sup>44</sup>

A federal district court in Olesen v. Board of Education of School District No. 228 upheld the suspension of a male student for wearing an earring in violation of a school rule.<sup>45</sup> The rule had been enacted to reduce the disruptive effects caused by student gang members. The members wore symbols of their gang membership. The student wore an earring that had a cross; a symbol used by one gang. He said he did not belong to a gang, and wore the earring to express his individuality. The Court said, citing Bethel, school officials have "the responsibility to teach not only English and history, but the role of young men and women in our democratic society."<sup>46</sup> To achieve this purpose, the "direction and manner of this instruction rests with the Board, not the federal courts."<sup>47</sup>

Students' free speech rights were found not to be violated when they were suspended for distributing an unofficial student newspaper on the school campus in Bystrom v. Fridley High School.<sup>48</sup> An article in the paper reported on the vandalism done to a teacher's home, and concluded that many students would like to claim responsibility for the act. The article caused disruption in some classes and the named teacher left school rather than face student reaction to the article. The court regarded the key issue in the case as a challenge to a disciplinary decision by school officials responsible for administration of the school. The court said the "Supreme Court . . . deferred to the school authorities' decision that maintaining order and discipline and proper inculcation of traditional social values required discipline of the student involved."<sup>49</sup> Based on this interpretation of Bethel, the court upheld the suspension because

the article advocated violence against the teacher--not a traditional social value.

In Crosby By Crosby v. Holsinger,<sup>50</sup> students brought a first amendment challenge against a principal for banning the school's "Johnny Reb" symbol. The Fourth Circuit ruled in favor of the principal citing Hazelwood as giving school officials "the authority to disassociate the school from controversial speech even if it may limit student expression."<sup>51</sup> The court reasoned the symbol bears the school's imprimatur and "school authorities are free to disassociate the symbol because of educational concerns."<sup>52</sup> The educational concerns were complaints the symbol offended blacks and limited their participation in school activities.

A recent and significant decision using the Bethel and Hazelwood precedent was decided by the Eleventh Circuit in Virgil v. School Board of Columbia County.<sup>53</sup> The issue was whether the first amendment prevents a school board from removing a previously approved textbook from an elective course because of some materials' vulgarity and sexual explicitness.<sup>54</sup> The objectionable material was in the translations of Lysistrata by Aristophanes and The Miller's Tale by Chaucer. The court first noted the Bethel and Hazelwood decisions gave school officials authority to protect students from vulgar and lewd material, and to control school-sponsored expression. In applying the Hazelwood standard, the court determined the material was part of the curriculum and could be perceived as bearing the "imprimatur" of the school. The court then considered the motivation for removing the text, and found it was because of the selections' explicit sexuality and extensive use of vulgarity. Therefore, school officials had a legitimate pedagogical reason for removing the text. Acknowledging that Lysistrata and The Miller's Tale were acclaimed masterpieces in Western literature, the court concluded that because of the students' age--fifteen to seventeen--the decision was reasonable, and the court's role was not to second guess the wisdom of the decision.

## Conclusion

The foregoing review of the Bethel and Hazelwood decisions and their progeny raise some general considerations associated with the role of ethics and democratic values related to teacher education. Expressed as questions: (1) Is any discussion of ethics that ignores the law ethical?; (2) Is an attempt to define democratic values viable without discussing the decisions of the courts who are charged with interpreting the source of many of the values--the U.S. Constitution?

What of the pig in the parlor? This phrase refers to the growing area of censorship through what has become known as the "pig in the parlor" test.<sup>55</sup> According to this test, speech that might be protected is not if it occurs at an inappropriate time or place. The "parlor," given the article's topic, is public schools and the "pig" is speech not considered bearing the "imprimatur" of the schools. Some possible questions might be: (1) What are the "fundamental values" necessary for a democratic society?; (2) What are the "appropriate" knowledge and skills needed to inculcate those values?; (3) What are "legitimate pedagogical concerns" to achieve the task?; (4) How is "reasonable" to be determined in relation to pedagogical concerns?; and (5) When is

the perceived "imprimatur" stamped on school activities? If Lysistrata and The Miller's Tale are Pigs in the Parlor because they were inappropriate for tenth and eleventh grade students to read in class, what do teacher educators need to convey in regard to teaching the democratic value of free speech?

#### Notes

1. U.S. Const., amend. I.
2. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
3. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
4. See Organization for Better Austin v. Keefe, 402 U.S. 415, 419 (1971).
5. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).
6. See Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 560 (1975).
7. See Bantam Books, Inc. v. Sullivan, 372, U.S. 53, 70 (1963).
8. See Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 799-800 (1985).
9. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
10. Ginsberg, v. New York, 390 U.S. 629 (1968).
11. F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).
12. 393 U.S. 503 (1969).
13. Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
14. Gambino v. Fairfax County School Bd., 429 F.Supp. 731 (E.D. Va.), aff'd, 564 F.2d 157 (4th Cir. 1977); Bayer v. Kinzler, 383 F.Supp. 1164 (E.D. N.Y. 1974); Zucker v. Panitz, 299 F.Supp. 102 (S.D. N.Y. 1969).
15. Trachtman v. Anker, 563 F.2d 512 (2nd Cir. 1977), cert. denied, 435 U.S. 925 (1978) (paper's survey regarding sexual attitudes and practices would invade students' privacy rights by subjecting them to psychological pressure); Frasca v. Andrews, 463 F.Supp. 1043 (E.D. N.Y. 1978) (paper contained potentially libelous statements).
16. 457 U.S. 853 (1982).
17. See Note, "Administrative Regulation of High School Press," 83 Mich. L. Rev. 625, 626 (1984).
18. 478 U.S. 675 (1986).

19. Id. at 687.

I know a man who is firm--he's firm in his pants, he's firm in his shirt, his character is firm--but most of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts--he drives hard, pushing and pushing until finally--he succeeds. Jeff is a man who will go to the very end--even the climax, for each and every one of you. So vote for Jeff for ASB vice-president--he'll never come between you and the best our high school can be.

20. 755 F.2d 1356 (9th Cir. 1985).
21. Bethel, 478 U.S. at 681 (quoting C. Beard and M. Beard, New Basic History of the United States 228 (1968)).
22. Id.
23. Id.
24. Id. at 684.
25. Id. at 685.
26. Id. at 683.
27. Id. at 681.
28. Id. at 685.
29. Id. at 685-86.
30. 108 S.Ct. 562 (1988).
31. Id. at 566.
32. See Kuhlmeier v. Hazelwood School Dist., 607 F.Supp. 1450, 1466 (D.C. Mo. 1985).
33. See 795 F.2d 1368, 1373 (8th Cir. 1986).
34. Hazelwood, 108 S.Ct. 562, 565 (1988).
35. Id. at 568-569.
36. Id. at 569.
37. Id. at 570.
38. Id. at 571.
39. Id.
40. Id. at 570.